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No. 01-52

FILED

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CLERK

IN THE

Supreme Court of the United States

PACIFIC FISHERIES CORP.,

Petitioner,

v.

H.I.H. CASUALTY & GENERAL INSURANCE, LTD., H.I.H. MARINE INSURANCE SERVICES, INC., HIGHLANDS INSURANCE COMPANY, AGF-MAT, HARLOCK WILLIAMS LEMON, LTD., corporations,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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4 pp

I. THE NINTH CIRCUIT IS IN CONFLICT WITH ALL OTHER CIRCUITS

The arguments and authorities contained in Respondent's Brief in Opposition would be appropriate if the district court had "exercised its discretion" and denied petitioner's late jury request on that basis. In fact, there would have been no appeal and no request to this Court in that event. This is because Rule 39(b), Federal Rules of Civil Procedure, appears to grant the district court absolute discretion to deny a jury trial after a late demand. The district courts' exercise of discretion to deny a jury after a late demand is almost invariably upheld in *all* of the circuits.

In only *one* of those circuits, however — the *Ninth* — could a district court judge state that he *would* have granted a jury trial *if* he had the discretion to do so. All we ask this Court to do is to instruct the Ninth Circuit that the language of Rule 39(b) granting discretion to the district court judge cannot be eliminated by judicial fiat.

II. MANDAMUS WAS NOT AN APPROPRIATE REMEDY

About whether mandamus would have been a more appropriate remedy, this is not a matter where the district court judge was at variance with judicial precepts in the Ninth Circuit. Rather, it was a matter where the district court judge ruled, correctly, that the Ninth Circuit gave him no choice but to deny the request for a jury. Even in a case such as *Armster v. United States Dist. Court for Cent. Dist.*, 792 F.2d 1423 (9th Cir. Cal. 1986) where there was a finding of an unconstitutional suspension of the civil trial system, the Ninth Circuit refused to grant mandamus, stating that

"[m]andamus is a drastic remedy that should be invoked only in extraordinary circumstances."[1] (792 F.2d at 1431). It is doubtful that the Ninth Circuit would consider a district court's following its explicit instructions to make up such an "extraordinary circumstance."

It should also be noted that petitioner requested leave for an interlocutory appeal of the issue to allow the Ninth Circuit to revisit the question before trial. In response to that request, the district court correctly noted as follows:

* * *

> NO. AND I APPRECIATE THE REQUEST, AND I UNDERSTAND THAT THE NINTH CIRCUIT WILL NOT BE VERY HAPPY TO SEE THIS CASE IN THAT POSTURE, OR ANY CASE . . . LITIGATED IN THAT POSTURE.
>
> SO . . . YOU GOT ME, AND YOU GOT YOUR RECORD. . . .

* * *

(Appendix D, p. 24a).

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1. Citing *Kerr v. United States District Court*, 426 U.S. 394, 402, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1978).

CONCLUSION

Thus, this writ is sought after exhausting the appropriate remedies below. The writ does not attack the exercise of discretion by the district court. Rather, the writ seeks to require the Ninth Circuit to grant to district court judges the discretion mandated by Rule 39(b). Here, the district court judge has unequivocally stated that he would exercise that discretion in favor of a jury.

Respectfully submitted,

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